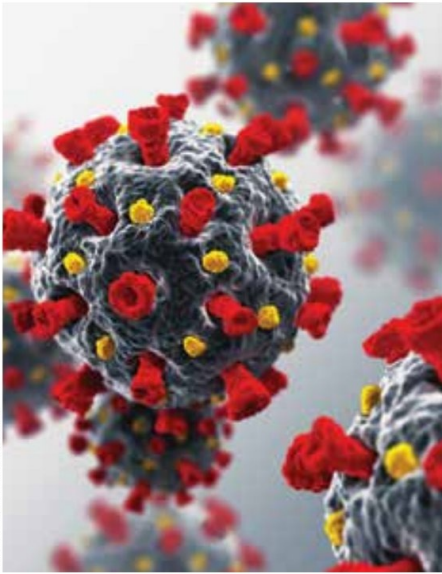


What Should You Do If You or a Client is Feeling Ill?

Coronavirus & Legal Ethics

By Amber Hollister



how the disease is impacting the practice of law in Oregon, go to osbar.org.

How can I support the justice system and lawyer wellness in the midst of the Coronavirus outbreak?

Part of being a competent, diligent lawyer is remaining aware of current events and considering how they may impact pending client matters. RPC 1.1, 1.3. Court closures, public health orders or declarations of emergency will have real impacts on clients' substantive and procedural legal rights. During the duration of the outbreak, therefore, lawyers should remain up to date on recommendations and advice of public health experts, including the Oregon Health Authority (tinyurl.com/OHAUpdates).

Further, lawyers should regularly review information and updates provided by courts, including the Oregon Judicial Department (courts.oregon.gov/Pages/default.aspx), local circuit courts, the U.S. District Court for the District of Oregon (tinyurl.com/DistrictCourtCovid19) and any other jurisdictions in which they appear. If courts close or delay proceedings, lawyers have a duty to communicate with clients about how their matters will proceed. RPC 1.4.

I'm not sick, but I want to prepare for the possibility I may be ill or need to self-quarantine. What should I do?

There is no time like the present to create a lawyer succession plan so that you have backup available if you become ill or unavailable to clients. Lawyers should plan now for the possibility that they may unexpectedly become incapacitated.

As the Legal Ethics Committee explains in OSB Legal Ethics Op 2005-129 (osbar.org/docs/ethics/2005-129.pdf), a lawyer's duty of competent representation includes arranging to safeguard clients' interests in the event of the lawyer's impairment,

incapacity or death. RPC 1.1. This duty is especially pressing for a lawyer who has no partners, associates or employees.

Absent advance planning, if a sole practitioner with no staff becomes incapacitated, there may be a significant lapse of time after the problem arises when the lawyer's clients' needs are not met. As the committee explains, "The duty of competent representation includes, at a minimum, making sure that someone will step in to avoid client prejudice in such circumstances."

Having a comprehensive succession plan is encouraged and can protect clients' interests. The Professional Liability Fund's guide, *Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death*, provides detailed information about the steps practicing attorneys can take to plan for possible incapacity. The guide is available at no cost to members on the PLF's website (osbplf.org/practice-management/books-from-the-plf.html) or on BarBooks (osbar.org/legalpubs/BarBooks.html).

While this column focuses on coronavirus, this experience is an opportunity to prepare for other kinds of potential disruptions. For other resources related to disaster planning, including resources from the PLF, see the Bar Counsel article *When Disaster Strikes* in the November 2018 issue of the Bulletin (tinyurl.com/BulletinDisaster).

I am sick, and I'm afraid it may be COVID-19. Even if it's not, I cannot go to court or meet with others because of possible exposure to coronavirus. What are my ethical obligations to clients?

While lawyers work hard to represent clients to the best of their abilities, we are only human. If you are sick or worried that you might become ill, follow the advice of your medical provider. But know that even as you do, your decisions will trigger

The novel coronavirus continues to ripple through communities across the state. As of this writing, leaders have declared national and statewide emergencies, canceled large gatherings and closed entire school systems. The courts have drastically limited court proceedings and enacted new juror procedures. Many employers have instituted telecommuting policies and called off meetings to encourage social distancing.

Every industry is wrestling with the effects of this pandemic, and the legal profession is no exception. The month of March saw a notable increase in calls to the Legal Ethics Helpline as lawyers across the state confronted questions about their ethical obligations in light of the outbreak, and that's likely to continue through April and beyond.

To provide lawyers with concrete guidance on ethical obligations, this month's Bar Counsel column tackles the questions we've been fielding. We're also continuously updating the bar's website as new information about the coronavirus and COVID-19 becomes available; for the latest on

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obligations under the Rules of Professional Conduct.

For example, the Oregon Health Authority has recommended individuals make decisions about avoiding risk of exposure based on their personal risk profile (e.g. age, underlying health conditions). If you need to self-quarantine, communicate with clients about how your decisions may impact the representation. If you are too sick to contact clients, reach out for help. If you are ill, do not go to court without first notifying the judge assigned to your case — or the presiding judge — and seeking direction on how to appear.

Attorneys have a duty to keep clients reasonably informed about the status of their case and explain matters to the extent reasonably necessary to permit clients to make an informed decision regarding the representation. RPC 1.4. If you are sick or need to avoid contact, explain to your clients how you plan to proceed with the representation. For instance, will you need to meet with clients via teleconference instead of in person? Will you need to continue or delay matters? Will another attorney need to help with the case?

If you are ill or under quarantine, consider whether you can continue to provide competent, diligent representation to your clients. RPC 1.1; 1.3. If a client might be harmed by delay or you will be unable to adequately prepare for matters, then you should consider whether withdrawal is appropriate. RPC 1.16(a)(1). In any event, you might consider turning to firm colleagues or utilizing your succession plan until the situation improves.

I'm too sick to continue representation in a case. What are my ethical obligations to clients?

Coronavirus is a serious illness. If a lawyer's physical health materially impairs the lawyer's ability to represent the client, the lawyer must seek to withdraw from representing the client. RPC 1.16(a)(2).

To help protect a client's interest, lawyers commonly ask law firm colleagues to substitute on matters for the duration of an illness. Alternately, lawyers with succession plans in place can elect to initiate the plan. When lawyers plan to rely on representation by lawyers outside of their firms, they should seek client consent (unless it is already in their engagement agreement).

If withdrawal is necessary, lawyers must take all reasonably necessary steps to

protect clients' interests upon withdrawal. RPC 1.16(d). Upon withdrawal, RPC 1.16(d) requires that the lawyer take steps to the extent reasonably practical to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fees or expenses that have not been earned or incurred.

What notice is reasonable and what steps are reasonably practicable to protect clients' interests will depend on the particular case. But if a lawyer becomes ill quickly, substantial notice may not be possible.

If a matter is pending before a court, lawyers must comply with any court rules requiring lawyers to provide notice or obtain the court's permission prior to withdrawal. RPC 1.16(c). Again: If you are ill, do not go to court without first notifying the judge assigned to your case — or the presiding judge — and seeking direction on how to appear. And do not engage in ex parte contact about the merits of your matter unless permitted by court rule. RPC 3.5(b).

Finally, if you believe you have committed malpractice as a result of your illness or need specific advice regarding avoiding malpractice during your illness, call the Professional Liability Fund at (503) 639-6911.

I am a law firm partner and I have learned a lawyer at my firm is sick. What are my ethical obligations?

If a lawyer is too sick to continue to provide diligent, competent representation to a client, firm leaders should step in to mitigate any potential harm to clients. Under RPC 5.1(b), law firm partners and supervisors with knowledge of misconduct have an ethical obligation to act to mitigate the consequences of ethical missteps by the lawyers they supervise. This includes situations where a lawyer is too sick to provide competent, diligent representation.

To avoid missteps, law firm supervisors should encourage lawyers to communicate about whether a serious illness might undermine work. Remedial actions depend on the specific circumstances, but they might include communicating with the affected lawyer's clients about a delay, substituting as counsel of record, or moving to continue matters.

Stepping in to aid an ailing colleague is the right thing to do, but it also helps avoid other consequences — a supervisor who

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